

1

JAMES KEE

1 IN THE UNITED STATES DISTRICT COURT FOR THE  
2 WESTERN DISTRICT OF PENNSYLVANIA

3 -----  
4 BURCHICK CONSTRUCTION COMPANY,) )  
5 INC., ) )  
6 Plaintiff, ) Civil Docket No.  
7 vs. ) 05-CV-12E  
8 HBE CORPORATION, ) )  
9 Defendant. ) )  
10 -----

11 Deposition of JAMES KEE  
12 (Thursday, September 22, 2005)

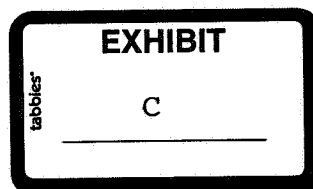
13 Filed on behalf of Plaintiff  
14 BURCHICK CONSTRUCTION COMPANY, INC.

15 Counsel of Record for this Party:  
16 KURT F. FERNSLER, ESQUIRE  
17 Reed Smith LLP  
18 435 Sixth Avenue  
19 Pittsburgh, PA 15219

20 WORDZ R US  
21 1139 Oakwood Drive, Suite 100  
22 Jefferson Hills, PA 15025  
23 Phone: (412) 655-1553

24 REPRODUCTION OF THIS TRANSCRIPT IS PROHIBITED  
25 WITHOUT AUTHORIZATION FROM THE CERTIFYING AGENCY

WORDZ R US  
(412) 655-1553



JAMES KEE

1 the 902F back charge.

2 A. Sure.

3 Q. This dollar figure, \$73,140, matches the  
4 dollar figure in HBE's counterclaim in this  
5 litigation. So, I'm going to assume that that's  
6 the counterclaim. Is that fair? Do you know?

7 A. No, I don't know. I don't know -- I  
8 haven't seen the counterclaim.

9 Q. Okay. All right. Now, this letter --  
10 I'm sorry, the December 1, 2004 letter says, "You  
11 are hereby notified of a forthcoming deduct  
12 Change Order to reimburse HBE Corporation for  
13 costs incurred to patch and grind concrete that  
14 was out of tolerance, to patch and grind control  
15 joints, to patch concrete walls in the elevator  
16 shafts and to grind excess concrete from the  
17 exterior columns of the canopies." Do you see  
18 that?

19 A. Yes.

20 Q. Underneath that, it indicates that  
21 there's back charges for a flooring sub, a  
22 drywall sub and a painting sub.

23 A. Okay.

24 Q. All the work described in the letter, the  
25 patching and grinding the different areas, was

JAMES KEE

- - - -

1 that all performed by the flooring sub?

2 A. I couldn't tell you. There were various  
3 subs involved. I believe that we had different  
4 subs doing different things. A lot of --  
5 obviously, the majority of this was done by the  
6 flooring subcontractor, the Penn Installations.

7 Q. All of these documents that are part of  
8 Exhibit 16, there's a lot of them, these all  
9 relate to Penn Installations.

10 A. Okay.

11 Q. Are you telling me that -- well, you  
12 weren't personally involved in dealing with Penn  
13 Installations on this back charge; is that right?

14 A. No. No, I wasn't.

15 Q. Do you know who it was?

16 A. Certainly it would be Jon Alderman, it  
17 would be other members of the project team.

18 Q. And you didn't talk to Jon Alderman to  
19 prepare for today's deposition, right?

20 A. As I said before, no.

21 Q. Okay. So, you probably can't -- can you  
22 answer any questions about the backup to this?

23 A. I totally relied on the people on the  
24 ground who actually generated this information  
25 relative to accuracy and completeness of it.

JAMES KEE

- - - -

1 Q. And if I ask you questions about how the  
2 labor charges were quantified for this back  
3 charge, can you answer any questions about that?

4 A. No, sir.

5 Q. And if I ask you questions about what  
6 specific areas of the project patching and  
7 grinding took place, can you answer any questions  
8 about that?

9 A. No, sir.

10 Q. And I already asked you this, but I want  
11 to make sure I understand: Throughout this  
12 Exhibit 16, there's a number of areas where some  
13 handwriting appears, usually in the context of  
14 allocated certain dollars to change order 902F,  
15 and you don't know whose handwriting that is,  
16 correct?

17 A. No, I don't.

18 Q. Do you know anything about what  
19 methodology was used by HBE to determine that  
20 Burchick installed concrete that was allegedly  
21 out of tolerance? I mean, how did HBE determine  
22 that?

23 A. I don't know specifically what they did.  
24 The specifications referred to a straight edge  
25 method, and there is ACI 117 which gives the

100

JAMES KEE

- - - -

1 tolerance over a ten foot span.

2 Q. How is that measured?

3 A. They can do that with a -- you know what?  
4 I'm not going to tell you how he did it because I  
5 didn't see him do it, but they can do that with a  
6 developed straight edge and actually measure the  
7 variation. I don't know what they -- whether he  
8 used a screen or what.

9 Q. Early this morning, we were talking about  
10 spec section 3.11B2.

11 A. Yes.

12 Q. Is that the spec section that HBE is  
13 making reference -- they're not making reference  
14 to the spec section in this letter, I understand  
15 that, they're saying things are out of tolerance.  
16 Is the spec section you gave me the spec section  
17 we ought to be talking about here?

18 A. For the most part, unless there are  
19 others that apply to other back charges, which if  
20 it was on column work, for example, that would be  
21 a different spec section.

22 Q. I'll ask you about another document.

23 (Kee Deposition Exhibit No. 17

24 was marked for identification.)

25 BY MR. FERNSLER:

WORDZ R US  
(412) 655-1553

101

JAMES KEE

1 Q. The witness has been handed Exhibit 17,  
2 which is a letter from HBE to Burchick, dated  
3 May 21, 2004. And, Mr. Kee, I recognize also  
4 that you're not the author or even copied on  
5 this. But I want to ask you about it, because it  
6 does reference the spec section, and the issue,  
7 the subject line reads, Floor Leveling.

8 A. Um-hmm.

9 Q. And it indicates that the second  
10 paragraph -- sorry, the first paragraph in this  
11 letter is to inform Burchick Construction of a  
12 forthcoming deduct change order for the excessive  
13 work associated with floor preparation for floor  
14 covering installation. In the northeast corner  
15 of the first floor, Burchick Construction has  
16 failed to meet the contractual obligation of  
17 Specification 3.10, Paragraph I or L, I'm not  
18 sure. On May 17, 2004, employees of Burchick  
19 Construction performed remedial work in the slab  
20 area, however, a significant area of the slab  
21 remains out of tolerance. This area is a  
22 surgical suite and the floor covering is  
23 predominantly sheet goods. End quotes. Do you  
24 see that?

25 A. Yes.

WORDZ R US  
(412) 655-1553

JAMES KEE

- - - -

1 Q. Is this the floor leveling issue that  
2 you're making reference to, is this what the back  
3 charge is about?

4 A. In part.

5 Q. Okay. What else?

6 A. I think there were a number of areas  
7 throughout the building that were not -- either  
8 they weren't brought into tolerance when the work  
9 was done or weren't done at all.

10 Q. Well, the complaints in the May 2004  
11 letter, is this the same work that Penn  
12 Installations and these contractors performed  
13 that make up the back charge?

14 A. I would believe that that's part -- in  
15 part what happened here. I mean, I believe that  
16 cost related to whoever was prepping the floor,  
17 whether it was Penn, is reflected in the back  
18 charge.

19 Q. But you can't tell me, sitting here  
20 today, whether Penn Installations was the  
21 subcontractor --

22 A. That did this work?

23 Q. -- that did this work?

24 A. I don't know.

25 (Kee Deposition Exhibit No. 18)

103

JAMES KEE

- - - -

1 was marked for identification.)

2 BY MR. FERNSLER:

3 Q. The witness has been handed Exhibit 18,  
4 which is a letter from Burchick to Phil  
5 Bosanquet, I think --

6 A. That's a good attempt.

7 Q. -- at HBE, dated May 25, 2004, signed by  
8 Dave Meuschke from Burchick, and it's copied to  
9 several individuals, including Jim Kee.

10 Mr. Kee, this is a letter from Burchick  
11 in response to Exhibit 17, the letter we just  
12 talked about.

13 A. Okay.

14 Q. And the last paragraph on the first page  
15 says, quotes, your letter also references  
16 non-compliance to Specification Section 3.10.I  
17 To make this statement, HBE must have independent  
18 inspection reports to substantiate this claim.  
19 Burchick is requesting that HBE provide specific  
20 data or inspection reports which support this  
21 claim of non-compliance, end quotes. Do you see  
22 that?

23 A. Yes, I do.

24 Q. HBE didn't have any independent  
25 inspection performed, correct?

WORDZ R US  
(412) 655-1553



104

JAMES KEE

- - - -

1 A. I'm not aware of any.

2 Q. I'm going to show you another document.

3 (Kee Deposition Exhibit No. 19  
4 was marked for identification.)

5 BY MR. FERNSLER:

6 Q. The witness has been handed Exhibit 19,  
7 which is a letter from HBE, dated June 14, 2004,  
8 from Jon Alderman, addressed to Dave Meuschke at  
9 Burchick. This letter is in response to the  
10 Burchick letter of May 25, 2004, which is Exhibit  
11 18. And in it, HBE says, quote, it is our  
12 intention to contact an independent firm and have  
13 them complete a floor slab survey and a  
14 petrographic analysis of the slab areas in  
15 question. Should this analysis confirm HBE's  
16 observations, Burchick will bare the direct  
17 expense of all survey and laboratory work. In  
18 addition to this, (based on the findings) it is  
19 also expected that Burchick be responsible for  
20 all corrective work required. We will provide  
21 you with a copy of the survey documents. End  
22 quotes. Do you see that?

23 A. Yes.

24 Q. HBE didn't do that, right?

25 A. I am not aware of that.

WORDZ R US  
(412) 655-1553

105

JAMES KEE

- - - -

1 Q. Okay. Are you not aware of whether they  
2 did the surveys, or whether they supplied the  
3 surveys to Burchick, or both?

4 A. Both.

5 Q. Okay. And the work that's referenced in  
6 this letter from Jon Alderman, HBE, is the same  
7 work that's the subject of the back charge in  
8 this litigation, is it not?

9 A. I believe so.

10 MR. FERNSLER: The next document is  
11 Exhibit 20.

12 (Kee Deposition Exhibit No. 20  
13 was marked for identification.)

14 BY MR. FERNSLER:

15 Q. The witness has been handed a collection  
16 of papers marked as Exhibit 20, bearing Bates  
17 number D-476 through D-490.

18 Mr. Kee, take a minute to look at this.  
19 I'm looking at the first page, and it says it's a  
20 change order, it says to Thomarios. Do you see  
21 that?

22 A. Yes.

23 Q. And Thomarios is listed on the second  
24 page of Exhibit 16 as one of the subcontractors  
25 that apparently did some of the work under change

WORDZ R US  
(412) 655-1553

106

JAMES KEE

- - - -

1 order 902F.

2 A. All right.

3 Q. And on this first page of Exhibit 20, you  
4 see that there in handwriting at the bottom, it  
5 says, reference 902F, CC-BC?

6 A. Yes.

7 Q. Do you see that? So, this document was  
8 produced to me in this order by HBE, so I'm  
9 assuming that these are the documents that HBE is  
10 in possession of that supposedly make up the  
11 Thomarios portion of back charge 902F. Is that  
12 fair?

13 A. I don't know if it's the total amount. I  
14 can't read the dollar amount associated with it.

15 Q. But do you even know if Thomarios is one  
16 of the subs that did work under back charge 902F?

17 A. Only what I can read here.

18 Q. Same questions as with Penn  
19 Installations, you can't answer questions about  
20 how the laborer charges were quantified for the  
21 back charge, correct?

22 A. That's correct.

23 Q. And you don't know exactly what Thomarios  
24 did related to the back charge, correct?

25 A. Correct.

WORDZ R US  
(412) 655-1553

107

JAMES KEE

- - - -

1 MR. FERNSLER: Next document is  
2 Exhibit 21.

3 (Kee Deposition Exhibit No. 21  
4 was marked for identification.)

5 BY MR. FERNSLER:

6 Q. The witness has been handed Exhibit 21,  
7 which is a collection of papers bearing Bates  
8 number D-451 through D-464. And on the first  
9 page of this exhibit, Mr. Kee, it indicates  
10 change C-902D, and this is a letter from Easley &  
11 Rivers to HBE. And then on the first page in  
12 handwriting, somebody has written, total, C-902F,  
13 \$3,540. Do you see that?

14 A. Yes.

15 Q. You don't know whose handwriting that is,  
16 do you?

17 A. No, I don't.

18 Q. On the second page of Exhibit 16, you'll  
19 see there's also a handwritten entry for E & R,  
20 which I take to mean Easley & Rivers, for \$3,540.  
21 Do you see that?

22 A. On the same page, yes.

23 Q. I'm referring back now to Exhibit 16.

24 A. I'm sorry.

25 Q. It's all right. It's a lot.

WORDZ R US  
(412) 655-1553

108

JAMES KEE

- - - - -

1 Do you see there's an entry for E & R?

2 A. Yes, I see that.

3 Q. 3,540?

4 A. Yes.

5 Q. I take it that Exhibit 21 represents

6 HBE's project file with respect to Easley &

7 Rivers' portion of back charge 902F. Is that

8 fair?

9 A. Appears to be correct.

10 Q. Okay. And, again, you don't know what

11 work Easley & Rivers did in connection with the

12 back charge, right?

13 A. No.

14 Q. And you don't know how it was priced or  
15 quantified, correct?

16 A. No.

17 Q. Okay.

18 MR. FERNSLER: Next document,

19 Exhibit 22.

20 (Kee Deposition Exhibit No. 22

21 was marked for identification.)

22 BY MR. FERNSLER:

23 Q. I've handed the witness what's been

24 marked as Exhibit 22. It's a collection of

25 documents bearing Bates number D-465 through

WORDZ R US  
(412) 655-1553

109

JAMES KEE

- - - -

1 D-475.

2 A. (Reviewing document.)

3 Q. The first page of the exhibit says,  
4 Subcontract, Abbreviated Form, and lists HBE as  
5 the contractor, and the subcontractor is L.O.  
6 Bouquin Co., and in handwriting it reads, total,  
7 C-902F, \$250.70.

8 On the second page of the exhibit,  
9 there's a number of entries, and one of them  
10 indicates in handwriting again C-902F, \$250.70.  
11 And at page D-469 of the exhibit, there's a  
12 number of additional entries, and in the  
13 right-hand column, indicates BC/Burchick, total,  
14 C-902F, \$2,256. Do you see that?

15 A. Yes.

16 Q. And based on page 2 of Exhibit 16, which  
17 lists L.O. Bouquin at \$2,507, I am assuming that  
18 Exhibit 22 represents HBE's project file with  
19 respect to payments to L.O. Bouquin that they've  
20 allocated to back charge C-902F. Is that fair?

21 A. Appears to be correct.

22 Q. You're not familiar with the work L.O.  
23 Bouquin did in connection with the back charge,  
24 right?

25 A. No.

WORDZ R US  
(412) 655-1553

110

JAMES KEE

- - - -

1 Q. And your don't know how the price was  
2 arrived at?

3 A. No.

4 Q. And you don't know exactly what work L.O.  
5 Bouquin performed, right?

6 A. That's correct.

7 Q. Or when they performed it?

8 A. No.

9 MR. GLASS: Do you mind if I take a  
10 break?

11 MR. FERNSLER: Off the record.

12 (Recess.)

13 BY MR. FERNSLER:

14 Q. Mr. Kee, on back charge 902F we've been  
15 talking about for \$73,140, I'm going to ask you  
16 again about page 3 of Exhibit 16. That's the  
17 December 1.

18 A. Okay.

19 Q. Do you see that?

20 A. Um-hmm.

21 Q. In the calculation of the back charge  
22 total \$73,140, it indicates HBE administrative  
23 fee of \$9,540. Do you see that?

24 A. Yes.

25 Q. How was that fee arrived at?

WORDZ R US  
(412) 655-1553

111

JAMES KEE

- - - -

1 A. I don't know how it was arrived at in  
2 this particular case. Subcontract provides for  
3 charging administrative fees on back charges, and  
4 I cannot tell you what the basis of that number  
5 was here.

6 Q. Well, let's look at the subcontract. I'd  
7 like to know where in the subcontract that charge  
8 comes from, that's Exhibit 2, that's the hospital  
9 subcontract.

10 A. Refer you to clause A-5. And it's  
11 related to various charges against the  
12 subcontract, and towards the end it says, "If the  
13 unpaid balance of the Subcontract price shall  
14 exceed the cost of finishing the work, (including  
15 compensation for additional management and  
16 administrative services of Contractor) such  
17 excess shall be paid to Subcontractor."

18 Q. So, the phrase within the parentheses at  
19 paragraph A-5 is HBE's basis for charging this  
20 what they've labeled as an administrative fee; is  
21 that right?

22 A. That's right.

23 Q. You don't know how the fee on this  
24 particular back charge was arrived at?

25 A. No, I don't know. I was going to say I